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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-624

IN THE MATTER OF THE GUARDIANSHIP OF
WILLIAM HOWARD FENNER, A Minor
LAURENCE HOWARD FENNER,

Petitioner, Appellee

vs.

WILLIAM L. STRICKLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion below is reported at 192 Neb. 114, 219 N. W. 2d 229, and is set out in full as an appendix hereto (Appendix, page 17). Also appended therewith is a copy of the judgment, supplement to judgment, and Memorandum Opinion that was appealed from.

JURISDICTION

The County Court of Douglas County, Nebraska, entered an order on August 17, 1972, appointing William L. Strickland guardian for William Howard Fenner, a minor, without notice of the proceedings to the natural father, Laurence Fenner. On September 12, 1972, Laurence Fenner filed a petition in the same Court seeking to have the guardianship order set aside. A full evidentiary hearing was held in which the petition to set aside the guardianship was denied. Petitioner then prosecuted an appeal to the District Court of Douglas County, Nebraska, in which the guardianship was set aside on August 13, 1973, with a supplement to the judgment set out on September 4, 1973. The District Court passed over the constitutional question of the notice and made its decision to set the guardianship aside on the basis of the father being fit.

The respondent appealed to the Nebraska Supreme Court which reversed the decision of the District Court on June 13, 1974. Motion for a rehearing was denied on September 4, 1974.

The Jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3). The Petitioner has been denied his right to the care, custody, and nurture of his child without being notified of the original hearing which created the guardianship which is violative of Section 1, Artcle XIV of the United States Constitution and applicable decisions of this Court.

———o———

QUESTIONS PRESENTED

1. Is a natural father who is separated from his wife and children entitled to be notified in regards to a guardianship proceeding brought by a grandparent which involves the custody of the surviving child when the mother and second child were killed in an automobile accident?

2. Can the failure to notify the natural father be cured by a subsequent hearing to set the guardianship aside where the decision is based upon other grounds than the issue of notice, even when such issue was pleaded, raised and argued?

———o———

CONSTITUTIONAL PROVISION

U. S. Const. Amend. XIV, Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATEMENT OF THE CASE

Laurence and Cynthia Fenner were married in 1965, while Larry was in the Navy. Cynthia was the daughter

of William L. Strickland, respondent herein. Larry and Cynthia's first son, Billy, was born March 2, 1967, and another son, Kenny, was born March 25, 1969.

Larry, Cynthia and the two boys, Billy and Kenny, moved to West Fork, Arkansas, in August, 1970, about one year after Larry's temporary retirement from the Navy.

About the first of November, 1970, some two weeks after a fire had totally destroyed their home, Cynthia left Arkansas with the two boys, without telling anyone she was leaving, or where she was going (15:8).

Larry attempted to reach Cynthia when he learned that she was in Omaha, Nebraska, however Cynthia had an unlisted telephone number which she obtained when she learned that Larry had found her original number (17:23). Cynthia and Larry never communicated after she left Arkansas.

On March 23, 1972, Cynthia obtained a decree of divorce, granting her custody of the two boys, but without any order of child support by Larry, service having been obtained by publication, based upon her Affidavit that she did not know the whereabouts of her husband.

On August 6, 1972, Cynthia and her son Kenny Fenner were killed in an auto-train collision, and Billy Fenner was seriously injured. Nan Strickland, wife of Cynthia's father, William Strickland, telephoned the Washington County Arkansas Sheriff, and requested that he notify Laurence Fenner in West Fork that Cynthia and Kenny, his youngest son, were killed in a car accident and his older son, Billy, was in critical condition in an Omaha hospital and to call back to Mrs. Strickland. The Sheriff

delivered the message to Larry Fenner on the evening of August 7, and Larry returned the call the same evening learning the details of the accident.

Larry called the doctor who was treating Billy the same night that he was notified of the accident, August 7, and again on the 8th, 9th, 11th, and 13th of August, whereby Larry planned a trip to see Billy in accordance with the discussions with the doctor as it was impossible to attend the funerals for Kenny and Cynthia. Larry Fenner contacted his parents in Minnesota and they, at his request, attended the funeral services in behalf of Larry. Larry made a trip to Omaha on August 16, 1972 visiting Billy in the hospital that day and several days after, also visiting with William and Nan Strickland, and on the evening of August 16, he drove the Stricklands home from the hospital (285).

On August 14, 1972, William Strickland had filed a petition in the County Court of Douglas County, Nebraska, asking that he be appointed guardian of the person and property of William Howard Fenner (T8). That petition contains the sworn statement of William Strickland that the name of the minor's father is Laurence Howard Fenner and that his whereabouts are unknown (T10). On August 17, 1972, William Strickland appeared before the Court and executed his bond and oath. The Court then entered its order appointing William L. Strickland guardian for William Howard Fenner, the Court having found from the affidavit of the petitioner that no notice to the natural father was required (T12).

On September 12, 1972, after learning of the guardianship order Larry Fenner filed a petition in the County

Court asking the Court to set aside the guardianship and to determine that Larry Fenner is the father and natural guardian of William Howard Fenner (T12).

A full hearing was held in the County Court on November 2 and 3, 1972, at the conclusion of which the Court dismissed the father's petition, without making specific findings of fact. Larry Fenner prosecuted an appeal from that order to the District Court of Douglas County, Nebraska. After the trial, which was held de novo on the record of the County Court, the District Court making findings of fact on the issue of the father's fitness and negating the allegation of abandonment, set the guardianship aside and awarded the custody of Billy to the natural father, the petitioner herein (T40).

The District Court Judge passed over the issue of notice without making any specific findings as to that issue, but did find that Mr. Strickland appeared to know where and how Larry Fenner could be located.

By a later supplement to judgment The District Court Judge amended his order keeping the child within the jurisdiction and with the grandparents until the judgment became final.

The grandfather-respondent appealed the decision to the Nebraska Supreme Court on the ground that the father was not a fit and suitable person to have the custody of the child. The Nebraska Supreme Court reversed the District Court without making any decision on the issue of notice finding that the father was unfit at the present time, that the child was now well cared for by the grandparents, and that it was in the best interest of the child

to leave him where he was, especially since he is now under the jurisdiction of the Court.

Larry Fenner moved for a rehearing in the Nebraska Supreme Court solely on the ground that he had not been allowed due process of law in that he had not been given notice of the original guardianship in the County Court. The Court denied this motion.

———o———

ARGUMENT

The Nebraska Supreme Court based its decision on three things: 1) the father, Larry Fenner, was found to be unfit at the present time to receive custody of his son, Billy; 2) Billy is at this time well cared for by the grandparents; and 3) Billy is within the jurisdiction of the Nebraska Court.

The Court did not decide the issue of notice, and while it was not an assignment of error, the issue was presented numerous times within the record of the case. The reason it was not assigned as an assignment of error was simply because the natural father prevailed in the District Court and upon the grandfather's appeal to the Nebraska Supreme Court, the natural father was an appellee and not an appellant.

The record in the case had many direct references to the issue of notice. On August 7, 1972, the day following the accident, Nan Strickland, the guardian's wife, telephoned the Sheriff in Washington County Arkansas, asking him to notify Larry Fenner in West Fork, Arkansas

of the accident, which telephone call Larry Fenner returned that night upon receiving the message (24:7). Yet on August 14, 1972, seven (7) days later, William Strickland stated under oath to the County Court in the guardianship proceeding that the father's whereabouts were unknown (T8). Larry Fenner came to Omaha to visit Billy on August 16, 1972, and visited with the Stricklands at the hospital and while driving them home from the hospital not one mention was made of the guardianship proceeding (28:5) instituted by William Strickland on August 14 and finalized August 17 (T10).

The County Court upon granting the guardianship found that notice was not required. This conclusion was based on the sworn affidavit of William Strickland, grandfather-guardian, that the whereabouts of the natural father, Larry Fenner, were unknown. The subsequent hearing to set the guardianship aside in the County Court did not make any specific findings of fact. The District Court decided on appeal that the issue of notice was unnecessary in making its ruling on the case and passed over the issue without making a specific finding, but did state in its Memorandum Opinion as follows:

> "The County Court apparently went past the issue of notice and went to the issue of custody of the child, and this court elects to do the same, though noting that the evidence is pursuasive that the guardian's wife had no difficulty locating Larry right after the accident to notify him of the tragedy and that any reasonable effort by the guardian could have again located him days later (T41)."

This decision by the District Court left both parties in the position of not being able to appeal on the issue of

notice, since there was no ruling made to appeal from. In the case of *Sarraillon v. Stevenson*, 153 Neb. 182, 191, 43 N. W. 2d 509, 514, the Nebraska Supreme Court has held:

> "The claim that a cross-appeal by appellees was a prerequisite to a consideration in this court of the issue of nuisance is obviously without merit. There is no record that the District Court found that the appellants were not maintaining a nuisance. The absence thereof prevented the appellees from stating on cross-appeal how the issue was decided in the trial court—one of the indispensable requirements of a resort to the remedy of cross-appeal. Any attempt by them to present a cross-appeal in this case as to the finding of the trial court on this issue would have been frivolous and futile."

The *Sarraillon* case held that the slaughter house was in fact a nuisance. The Court found that since by law the case was being tried de novo, they could make a ruling on the question of nuisance since there had been a great deal of evidence entered on the particular point.

The case at bar was heard de novo under Sec. 25-1925, Reissue of Revised Statutes of Nebraska, 1943, which holds that suits in equity shall be heard de novo in the Supreme Court. Specifically the case *Cass v. Peuse*, 155 Neb. 792, 54 N. W. 2d 68, holds that appeals in guardianship matters are heard de novo in the Supreme Court. The Nebraska Supreme Court should have considered the entire record which is replete with references to the lack of notice and the Court had the power to make a ruling upon that issue, and should have done so.

The first question needed to be answered is whether the father should have been notified about the proposed guardianship in order to satisfy the due process clause

of the 14th amendment. The United States Supreme Court had frequently dealt with the family unit with the general result that the existence of the family is very important.

> "The court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', *Meyer v. Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923), 'basic civil rights of man', *Skinner v. Oklahoma*, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942), and 'rights far more precious . . . than property rights', *May v. Anderson*, 345 U. S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U. S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the 14th amendment, *Meyer v. Nebraska*, 262 U. S. 399, 43 S. Ct. 651, 626 . . . *Stanley v. Illinois*, 405 U. S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 551 (1972)."

This position is further fortified by the State Legislature of Nebraska by the passage of a statute which explicitly states that the parents are the natural guardians of their own children and are entitled to the custody of their children.

> "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, services, and earnings, and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves

upon the other. Sec. 38-107, Reissue of the Revised Statutes of Nebraska, 1943."

The case of *Armstrong v. Manzo*, 380 U. S. 548, 85 S. Ct. 1187, 14 L. Ed. 62 (1965), deals with the specific issue of notice to a father concerning an adoption consent. Mr. Armstrong, the natural father of Molly Page Armstrong, was not given notice of the adoption proceedings of his daughter. Mrs. Manzo, Armstrong's divorced wife who had remarried the petitioning party in the adoption, filed an affidavit stating that the father had failed to contribute to the support of his daughter. On the basis of this affidavit, the Juvenile Court of the County in which the child resided issued its consent to the adoption without notice or a written consent of the father, as provided for by the Texas Statute:

> "Except as otherwise provided in this Section, no adoption shall be permitted except with the written consent of the living parents of the child: provided, however, that if a living parent or parents shall voluntarily abandon and desert the child sought to be adopted, for a period of two years, and shall have left such child to the care, custody, and control and management of other persons, or if such parent or parents shall have contributed substantially to the support of such child during such period of two years commensurate with his financial ability, then, in either event, it shall not be necessary to obtain a written consent of the living parent or parents in such default, and in such cases adoption shall be permitted on the written consent of the juvenile judge of the Juvenile Court of the County of such child's residence. Vernon's Ann. Civ. Stat., Art. 46a, § 6."

In its consideration of this case the Supreme Court did not ponder long on the issue of due and proper notice to the natural father:

> "In disposing of the first issue, there is not occasion to linger long. It is clear that failure to give petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. *Armstrong v. Manzo*, supra, page 550."

The adoption statute of Texas and the statute in Nebraska reaffirming the parent as the natural guardian of the child are based upon the same premise: the importance of the family. Each statute maintains the importance of the family unit, laying down very specific guidelines as to what the courts must find in order to destroy this family unit. The importance of the family as this Court has stated, is so basic as to require at the very least the minimum of due process requirements before such unit is tampered with. In *Mullane v. Central Hanover Bank and Trust*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) the Court succinctly presented the minimum required by the due process clause:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Hanover*, page 313."

The case of *Armstrong* re-emphasizes the position of the Court in the *Mullane* case in the context of the family, and again said:

> "As to the basic requirement of notice itself, there can be no doubt where, as here, the result of judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies. Page 550."

The second question to be answered is whether or not the action brought by Larry Fenner to have the guardianship set aside and a subsequent adjudication on the issues cures the constitutional infirmity. Great emphasis is again placed on the *Armstrong* case in the consideration of this question.

The father in *Armstrong* had a subsequent adjudication on the matter of his financial support of his daughter for the last two year period. The Court decided that the father had not in fact provided any substantial contribution to the support of the girl. The contention that was put forth by the respondents in the case before the U. S. Supreme Court was that Armstrong had had his day in court, he had been heard on the merits of the case and the Court had made a ruling on the issue in dispute.

The United States Supreme Court held that this subsequent adjudication could not and did not cure the Constitutional infirmity, stating:

> "Had the petitioner been given timely notice which the Constitution requires, the Manzo's, as the moving parties would have the burden of proving the case as against whatever defenses the petitioner might have interposed . . .
>
> "Instead the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge . . . Yet these burdens would not have been imposed upon him had he been given timely notice in accordance with the Constitution. Page 551."

The County Court in granting the initial guardianship did not make any specific findings of fact regarding

the fitness of Larry Fenner or the alleged abandonment of Billy by his father. The District Court did make specific findings of fact holding that Larry Fenner was in fact a fit and suitable parent and followed the rule that: "The custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent" laid down in *Carlson v. Wivell*, 181 Neb. 877, 152 N. W. 98; *Raymond v. Cotner*, 177 Neb. 158, 120 N. W. 2d 892; and *Williams v. Williams*, 161 Neb. 686, 74 N. W. 2d 543, which would place the custody of Billy with his natural father. However, the custody of Billy did not change. By a Supplement to Judgment the District Court Judge amended his order so that Larry Fenner was not allowed custody of his child until the judgment becomes final. So even though Larry Fenner was adjudicated to be a fit and suitable parent, he did not receive custody of the child and has not received custody of the child to date. Billy has been in the custody of the Stricklands since the accident.

The present custody of Billy seemed to have a great deal of importance in the decision by the Nebraska Supreme Court.

> "We are reluctant to hold under the facts of this case that appellee had forfeited all rights to Billy's custody, but we do find that at the present time is unfit to receive custody. His former treatment of the child, his emotional instability, his demonstrated immorality, and his apparent unsteadiness for work habits are not conducive to a finding of parental fitness. We have involved here a child at present suffering mental and physical handicaps. His care during the months to come is critical in regard to his future welfare. He is now well cared for by the appellant. To change

> the boy's custody would be to gamble in regard to the continuance of the mental and physical treatments his condition requires."

The Court appears to be taking the present custody and condition of Billy into account when it states that "he is now well cared for by the appellants (grandparents)". This reasoning seems to negate any presumption in favor of the father in having the custody of the child, but rather is putting it on a comparative level with the grandparents. The problem with this reasoning is that if Larry Fenner had been given the notice which he deserved in the original guardianship proceedings then the issue as to the child's present status could not and certainly would not bear any weight upon the question of custody of the child.

The decree in the County Court which created the guardianship was totally adverse to the father Larry Fenner, even though it made no specific finding of fact as to his fitness at that time. The fact remains, however, that the Court did award the custody of the child to the grandparents without that specific finding of unfitness. The custody of the child being placed with the grandparents through a judicial decree has proven itself to be hostile to the interest of the father, Larry Fenner. In light of the Nebraska Supreme Court's opinion, the father is put in the position of proving himself better able to care for Billy than he is now being cared for by the grandfather-guardian.

It is therefore the position and contention of this petitioner that the guardianship award made by the County Court was totally adverse in the sense of *Armstrong*.

The language used by the Supreme Court of Nebraska is not so unequivocal as to make the finding definite as

to the unfitness of Larry Fenner. The Court itself admits to being "reluctant" in forfeiting all rights of custody but finds the present condition of the child suitable and therefore makes its ruling as to the best interests of the child only after a determination that the child is now well cared for.

———o———

CONCLUSION

Larry Fenner has been denied due process of law by the action of the Douglas County Court of Nebraska, in awarding to the grandfather, petitioner's father-in-law, custody of Billy Fenner without prior notice to him as the child's natural father, and a definitive adjudication of the fitness of the father.

This wrong has since been compounded through various stages of litigation, each stage utterly failing to decide the constitutional infirmity of the father's notification.

Respectfully submitted,

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November—1974.

APPENDIX

IN RE GUARDIANSHIP OF WILLIAM HOWARD FENNER, APELLEE, V. WILLIAM STRICKLAND, GUARDIAN, APPELLANT.

219 N. W. 2d 229

Filed June 13, 1974. No. 39336.

1. Parent and Child: Infants. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right.
2. ———: ———. In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children.
3. Custody: Infants. Ordinarily the custody of children of tender years should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise.

Appeal from the District Court for Douglas County: James A. Buckley, Judge. Reversed and remanded.

David S. Lathrop and Richard L. Swenson of Lathrop, Albracht & Dolan, for appellant.

David J. Burleson and Joseph P. Inserra of Krause, Inserra, Petersen & Burkhard, for appellee.

Heard before White, C. J., Spencer, Boslaugh, McCown, Newton, Clinton, and Brodkey, J.J.

Newton, J.

This is a contest over the guardianship and, consequently, custody of William Howard Fenner, commonly

referred to as Billy. Billy was born March 2, 1967. The present litigation is between Billy's maternal grandfather *William L. Strickland, appellant, and his father Laurence* Howard Fenner, appellee. *Appellant was appointed guardian in the county court.* The District Court reversed the judgment and awarded appellee custody. We reverse the judgment of the District Court.

Appellee spent several years in the United States Navy. He was discharged due to a nervous reaction causing stomach problems and draws a disability pension. The family moved to Arkansas in August 1970 and was accompanied by a young woman referred to as Linda. Linda had one child born out of wedlock to a man with whom she had lived for about a year and a half. The group lived most of the time under very crowded conditions with appellee's parents. The two women found employment but appellee failed to work for a considerable period. There is evidence indicating that Linda and appellee became intimate and appellee's wife left, went to Omaha where her father resided, and established a home for herself and her two children. She and her younger son were killed in a car-train accident on August 6, 1972. Prior to her death appellee's wife had obtained a divorce. Efforts were made to get appellee to contribute to the support of his children but he failed to do so and made no effort to see them until several days after the accident when he contacted Billy in the hospital. In the meantime a child had been born to Linda about 9 months after appellee's wife had left him. Appellee and Linda lived together until after the divorce at which time they married. Appellee has now established a separate home for

himself and his family and says he operates a trash-hauling route and a junk and antique business.

Billy's mother had obtained psychiatric treatment for him in Omaha. He was hyperactive and his speech was immature. The doctor's history obtained from the mother states: "'William does not talk very well and the reason that he does not talk very well is the fact that every time he used to talk when he first started, his dad used to whip him because he would interrupt him. The mother and father have been divorced two years in November and the mother is going to remarry in September. Billy is reported as being in Head Start, never crying, hitting other kids with sticks, pulling their hair, never sits down. He eats well and she can put him outside and he will stay close to home. She said "If I lay down with him he may go to sleep." He has always been very active. At 5 months he had a hernia and had another hernia repaired two years ago. He was born in Newport, Rhode Island and weighed 7 pounds and 11 ounces and was a good baby. He walked at 1 year and had fairly good developmental milestones. The father had some sort of a mental disorder.'"

Billy was severely injured in the accident sustaining a leg injury and possible brain damage. After the accident Billy's condition regressed. He needed rehabilitation for his leg, speech therapy, a special needs school, perhaps psychiatric care, security, and one caretaker. He has been in the care of his grandfather and step-grandmother, has been well cared for, and appears to be attached to them. He is also under the supervision of the Douglas County social services department.

The problem presented is not one devoid of difficulties. "Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right." Sanny v. Sanny, 182 Neb. 1, 152 N. W. 2d 27.

We are reluctant to hold under the facts of this case that appellee has forfeited all rights to Billy's custody but we do find that *at the present time* is unfit to receive custody. His former treatment of the child, his emotional instability, his demonstrated immorality, and his apparent unsteadiness in his work habits are not conducive to a finding of parental fitness. We have involved here a child at present suffering mental and physical handicaps. His care during the months to come is critical in regard to his future welfare. *He is now well cared for by appellant.* To change the boy's custody would be to gamble in regard to the continuance of the mental and physical treatments his condition requires. This we are not disposed to do as: "In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children." Gydesen v. Gydesen, 188 Neb. 538, 198 N. W. 2d 67. See, also, Loveall v. Loveall, 188 Neb. 457, 197 N. W. 2d 381.

We believe that in a case such as this, it is very important to the welfare of the child that he be retained within the jurisdiction of the court so that continued supervision may be had. Ordinarily the custody of children of tender years should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise. See Bauer v. Bauer, 184 Neb. 777, 172 N. W. 2d 231.

The judgment of the District Court is reversed and the cause remanded for entry of judgment in conformity with this opinion.

REVERSED AND REMANDED.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Doc. 655 No. 60

IN THE MATTER OF THE GUARDIANSHIP OF
WILLIAM HOWARD FENNER,

A Minor.

JUDGMENT

This case having been tried in this court on August 28, 1973, upon appeal from the Judgment of the County Court entered November 3, 1972, evidence having been adduced, briefs having been submitted, and the court being fully advised in the premises, and the court having filed this date a written Memorandum Opinion, which opinion is incorporated herein,

IT IS ORDERED, ADJUDGED AND DECREED, that the order of the Douglas County Court, dated August 17, 1972, which appointed William L. Strickland as the guardian of William Howard Fenner, a minor, be and the same is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Laurence Howard Fenner is the father and natural guardian of the said minor and is granted

legal custody of said minor, and is given permission to remove said minor from Douglas County, Nebraska, to his home in the State of Arkansas.

DATED, this 31st day of August, 1973.

BY THE COURT:

/s/ James A. Buckley,

Judge.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Doc. 655 No. 60

IN THE MATTER OF THE GUARDIANSHIP OF
WILLIAM HOWARD FENNER,

A Minor.

SUPPLEMENT TO JUDGMENT

The Judgment of this court entered August 31, 1973, is hereby supplemented by adding the following:

IT IS ORDERED, ADJUDGED AND DECREED that that provision of the Judgment granting Laurence Howard Fenner permission to remove said minor from Douglas County, Nebraska, to his home in the State of Arkansas shall not become operative until, and unless, the Judgment becomes final.

DATED this 4th day of September.

BY THE COURT:

/s/ James A. Buckley,

Judge.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Doc. 655 No. 60

IN THE MATTER OF THE GUARDIANSHIP OF
WILLIAM HOWARD FENNER,

A Minor.

MEMORANDUM OPINION

This case comes before this court on appeal from the Douglas County Court, for trial de novo on the record. Trial in the County Court was had on November 2 and 3, 1972. Trial in this court was had on August 28, 1973, at which time the Court received evidence in addition to the transcript of evidence and exhibits from the County Court but limiting such additional evidence to the time of the original trial.

Larry and Cynthia Fenner were married in 1965 and had two sons, Kenny and Billy, born March 2, 1967. On about November 1, 1970, while living near Fayetteville, Arkansas, Cynthia left with the boys and came to Omaha where her father and stepmother reside.

On March 23, 1972, Cynthia obtained a decree of divorce, granting her custody of the two boys, but without any order of child support by Larry, service having been obtained by publication.

On August 6, 1972, Cynthia and Kenny Fenner were killed in a train-car accident, leaving Billy seriously injured. Eight days later, William Strickland, Billy's maternal grandfather petitioned the County Court for appointment as his guardian, which was done on August 17.

1972. Billy's father, Larry Fenner, was not notified of the guardianship proceedings, the petition alleging his whereabouts as unknown. Shortly thereafter, Larry learned of the guardianship and on September 12, 1972, filed a petition in County Court to set aside the guardianship, alleging lack of notice. To the petition the guardian answered, denying knowledge of Larry's whereabouts and alleging his abandonment of Billy and unfitness to be his guardian or have his custody.

The County Court apparently went past the issue of notice and went to the issue of custody of the child, and this Court elects to do the same, though noting that the evidence is persuasive that the guardian's wife had no difficulty locating Larry right after the accident to notify him of the tragedy and that any reasonable effort by the guardian could have again located him days later. In fact, the petition for appointment of guardian was filed the day before Larry came to Omaha to see Billy.

The issue, then, is the right to custory of a six-year old boy as between his natural father and his maternal grandfather. This precise issue is extensively annotated in 25 A. L. R. 3rd 1, but we need not leave Nebraska to find cases involving this type custody contest, which amply provide the governing principles of law.

The custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. *Carlson v. Wivell*, 181 Neb. 877, 152 N. W. 1d 98; *Raymond v. Cotner*, 177 Neb. 158, 120 N. W. 2d 892; *Williams v. Williams*, 161 Neb. 686, 74 N. W. 2d 543.

A decree of divorce which awards the custody of a minor child to the mother and, therefore, there is no finding of unfitness of the father, does not deprive the father of the natural right of custody of his child, except as against the mother. *Carlson v. Wirell, supra.*

The right of a parent to the custody of a minor child is not to be lightly set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit to perform the duties imposed by the relationship or to have forfeited his superior right to such custody. *Carlson v. Wirell, supra; Raymond v. Cotner, supra; and Williams v. Williams, supra.*

The natural statutory rights of parents are of important consideration, and, in the absence of special circumstances the child or children should be awarded to the parent or parents as against more distant relatives or third persons. *Baumann v. Baumann*, 169 Neb. 805, 101 N. W. 2d 193.

The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited. *Williams v. Williams, supra.*

I.

Fitness of Grandparent Guardian.

William Strickland, the legal guardian, is forty-nine years old, was divorced from Cynthia's mother in 1958, married Nancy Strickland, his present wife, who is thirty-five years old, in 1960. At the divorce he obtained cus-

tody of Cynthia and raised her until she married Larry. He works for an automotive electrical company and takes home $81.00 per week. They are buying their two-bedroom home, adequate for Billy and his grandparents, the Stricklands having had no children of their own.

The guardian's surroundings are modest and his financial condition is marginal. When Cynthia came to Omaha with the boys in 1970, he was out of work and unable to help support them. Cynthia proceeded to go on welfare. There is evidence that he drinks too much, causing him to be unreliable at times in his work, having been fired from a former job, but he is otherwise a good worker.

Prior to the accident, William saw his daughter and grandsons on weekends. Since the accident and his release from the hospital, Billy has lived with the Stricklands, who have given him all the love and care that could be expected. Though William Strickland describes his marriage as, "like a couple cats and dogs; you know, how a marriage goes up and down", there is no evidence of instability in that regard and there is no doubt that the guardian and his wife would be fit custodians of Billy.

II.

Fitness of Larry Fenner

A. Abandonment.

Cynthia left Larry suddenly and without warning and brought the boys to Omaha. Larry knew she went to Omaha and after some difficulty managed to get Cynthia's unlisted phone number. An attempted call by his mother was unsuccessful, and Cynthia, apparently aware

that Larry learned the number, changed it, again unlisted. He did not persist very long and never came to Omaha nor attempted to write his wife or sons, though he had an Omaha address he knew would reach them. He sent no money, holiday cards, presents, or anything. In February 1971, Cynthia commenced legal proceedings for support, and in July, 1971, both parties represented by counsel, an order was entered, which recognized that Larry had not tried to contact or support his boys since served with the summons in February, required Larry to pay support of $60.00 per month but only after "the children are returned to this area . . . for . . . visitation . . . or other satisfactory arrangements can be made for visitation." (Why the delay from February to July is unclear). Larry has never paid anything toward their support but never saw them before the accident.

Abandonment imports any conduct on the part of the parent which evidences a settled purpose to forego all parental rights and relinquish all parental claims to the child and to renounce and forsake the child entirely. 2 Am. Jur. 2d, Sec. 33.

Did Larry abandon Billy? I don't think so. His lack of effort to reach his wife and sons, even to write or voluntarily send support, before and after the court order, is hardly commendable, but his lack of zeal is well outweighed by the zeal of Cynthia in her determination to avoid him. This undoubtedly lessened Larry's efforts and created a situation far different from a wife who encourages communication and visitation by the child's father.

After the accident, Larry failed to attend the funeral, claiming inability to get to Omaha for business reasons. He did send flowers, arranged for his parents to attend, and made frequent calls to various people in Omaha. He came to Omaha nine days later (during much of that time Billy was in a coma) and again shortly thereafter, visiting Billy at the hospital both times.

The guardian cites *Williams v. Williams, supra,* regarding abandonment. There, the father, though having visited his child from time to time and having made some contributions toward support, had never sought custody of his son since his wife died right after his birth, but rather approved and consented to the child living with his parental grandparents for a period of eight years.

Here, while Larry's conduct had its shortcomings, considering all the circumstances, it did not evidence a settled purpose to forego all his parental rights or to renounce and foresake Billy entirely.

B. Unfitness

1. Moral character and emotional stability.

While in Virginia, Larry and Cynthia befriended one Linda and her child, brought them to Arkansas with them and there is evidence that Larry had become intimate with Linda which caused Cynthia to leave and come to Omaha about November 1, 1970. Larry denies this, but admits he did become intimate with her about two months later, and, when she became pregnant with his child, later began to live with her ostensibly as husband and wife. Their child was born August 9, 1971, and they were married on September 11, 1972.

Larry's Navy separation was due to a nervous condition which he attributes to the Navy placing him in sophisticated electronic work beyond his capabilities. There is evidence that Billy is a hyperactive child with certain emotional disorders brought about at least in part by his father's unwarranted physical abuse and indifference to him. Cynthia placed him under the care of a psychiatrist in Omaha and it appears a good portion of his problem related to a difficult neighborhood environment he was initially placed in in Omaha. Linda and neighbors of Larry in Arkansas characterize him at present as a good and considerate father.

2. Economic and home conditions.

Larry's financial condition at the time Cynthia left for Omaha was bleak. A fire destroyed the tiny home they were renting. Without insurance, they lost everything. Larry had shown a definite lack of initiative in obtaining and holding a job for any length of time. Now he operates a trash hauling business in West Fork, says he has about eighty customers, and operates Larry's Junk and Antique Shop. He has ambitions to get a contract with the City of West Fork (pop. 1000) to haul refuse and join the volunteer fire department.

Larry's family consists of his wife Linda, their son Scotty, now a little over a year old, and Linda's daughter Mary Catherine, age 3 (from a purported Marriage to one Carlton Evans. Linda went through a private marriage ceremony in Junction City, Kansas. She now feels certain no legal marriage ever existed, thus has never obtained a divorce or annulment.) They lived in various

small, extremely modest homes. Their present home is their largest, relatively new, and with three bedrooms. It appears to be a decided improvement over previous homes.

III.

Best Interests of the Child.

This is the dominant factor in every child custody contest, regardless of the relationship of the contesting parties, and if the best interests of the child clearly lie with the distant relative or stranger, this can overcome even the superior rights of the otherwise fit father.

The guardian makes a strong case that Billy should remain in Omaha because of his physical and mental condition following the accident. Already a hyperactive child in a psychiatrist's care before the accident, Billy now has a severe functional impairment of his left leg and distinct possibility of brain damage. The psychiatrist noted a considerable regression mentally when he saw him ten days before the hearing. He is in need of therapy for his leg, speech therapy, further psychiatric care, and a special needs classroom when he enters school. Under the guardian's care and with the welfare financial assistance of Douglas County Social Services, he is receiving therapy and excellent medical care.

CONCLUSION

Larry Fenner's past contains many transgressions, financial problems and evidence of instability. However,

he reached a low point when Cynthia left for Omaha, but has steadily improved his entire lifestyle to the present, where he seems to be happily married and financially able to support his family though in modest surroundings. The Stricklands have a more established stability situation, having been married thirteen years (though not without problems as the guardian admits and Mrs. Strickland suggests strongly in her letter to Larry—Exhibit 3), though a comparable modest lifestyle.

I consider the father's right to his own child a strong one, not to be lightly set aside. *Carlson v. Wivell, supra.*

In *Williams v. Williams, supra,* the court considered the return of the child to his father after eight years as an experiment. Here, the guardian, though having seen Billy while Cynthia lived in Omaha, has had his exclusive, full time care a very short time.

There may be less speculation involved in placing the child with the guardian. But I find Larry at the present time to be a fit parent, to be afforded the opportunity to raise his child. He says there are adequate medical facilities in Fayetteville, Arkansas, to provide for Billy's special needs. I reach this conclusion not without some misgivings, because Larry's present stability is neither substantial nor of any very long duration. But I am comforted in this language by our Supreme Court:

> " 'We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely

because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law it would be soon changed, by revolution if necessary. * * *' " *Baumann v. Baumann, supra.*

" * * * The unfitness which deprives a parent of the right to the custody of his child must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive a parent of his right to their custody.' " *Baumann v. Baumann, supra; Raymond v. Cotner, supra.*

" * * * If the placing of the child with her own father is to be described as an experiment, it is one that has proved successful over the years irrespective of the fact that a parent occasionally fails in his duties and obligations to his child. * * * " *Raymond v. Cotner, supra,* at page 172.

THEREFORE, I find that the order of the Douglas County Court appointing William Strickland as legal guardian should be vacated and set aside and that Billy shoud be placed in the custody of his father, the natural guardian.

Dated, this 31st day of August, 1973.

BY THE COURT,

/s/ James A. Buckley, Judge